Supreme Court, U. S.
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No. 76-1664

In the Supreme Court of the United States

OCTOBER TERM, 1977

FELIPE GAMA-GARCIA,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Felipe Gama-Garcia, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above-case, which found him deportable as having obtained a visa based on a "sham marriage."

JUDGMENT AND OPINION OF THE COURT BELOW

Appeal was taken to the United States Court of Appeals for the Seventh Circuit from the entry of an

Order by the Board of Immigration Appeals in favor of the Respondent, approving the determination of the Special Inquiry Officer.

On the appeal, the Petitioner urged that the Respondent had not sustained its burden of proof by "clear, convincing and unequivocal evidence." The Court of Appeals' in the said decision of April 7, 1977 rejected the Petitioner's claim.

The opinion of April 7, 1977 is an unpublished order not to be cited per Circuit Rule 35.

JURISDICTION

The Order of the United States Court of Appeals for the Seventh Circuit affirming the decision of the Board of Immigration Appeals and rejecting Petitioner's claim was filed on April 7, 1977. This petition is filed within 90 days of that Order. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Did the Court of Appeals err by reducing the burden of proof from "clear, convincing and unequivocal evidence" as required by the Supreme Court in *Woodby* v. *INS*, 385 U.S. 276 (1966) to reasonable, substantial and probative?

STATUTES INVOLVED

Section 241(a)(1) (8 U.S.C. 1251(a)(1)), Section 212 (a)(14) (8 U.S.C. 1182(a)(14), and Section 212(c) (8 U.S.C. 1182(c) of the Immigration and Nationality Act.

STATEMENT OF THE CASE

This case involved an appeal from the decisions of the Special Inquiry Officer, the Board of Immigration Appeals and the United States Court of Appeals for the Seventh Circuit in favor of the Respondent, upholding an order by the Respondent to deport the Petitioner from the United States. This petition prays the Court to issue its Writ to review the record which it is urged is not supported by "clear, convincing and unequivocal evidence."

STATEMENT OF FACT

Petitioner, Felipe Gama-Garcia, is a native and citizen of Mexico who last entered the United States in possession of an immigrant visa. He claimed to be exempt from the labor certification requirement by reason of marriage to a United States citizen. Based on this representation, he was admitted as an immigrant at Detroit, Michigan on August 19, 1970 as an immediate relative. On April 19, 1973, the Petitioner was served with an Order To Show Cause charging him with being deportable, which Order To Show Cause was based essentially on charges that the marriage he entered into was a "sham." Subsequently, on or about July 10, 1973 a deportation hearing was commenced before an Immigration Judge. The record of the hearing consists of 282 pages of transcript, together with 25 exhibits. At the first hearing the Petitioner, through his then attorney, denied the substantive charges of deportability. The capsulized testimony of the government's witness in chief, the ex-wife of the Petitioner, was that the marriage she entered into with the Petitioner was on her part a sham. At a hearing on February 26, 1974 the government clearly indicated it had no further evidence on the question of deportability; however, at

another hearing on April 11, 1974, the Immigration Judge permitted the government to present an alleged corroborating witness.

The Petitioner herein in his testimony essentially denied the allegation that his marriage to Lydia Colon was a sham. He also testified that he has been in the United States since 1965 save for his trip to Canada to obtain his immigrant visa. The Petitioner presented a witness to corroborate his testimony that he did in fact live with Lydia Colon.

Lydia Colon, by her own admission, admitted that she had been addicted to the use of heroin. She also admitted that she had an arrest record relating to narcotic offenses.

Petitioner was granted the privilege of voluntary departure by the Immigration Judge. The Immigration Jdge, in a twenty page decision decided that the Petitioner was amenable to deportation on all of the charges. A timely appeal was taken to the Board of Immigration Appeals, who sustained the decision of the Immigration Judge in a three page decision.

On June 1, 1976 the Petitioner herein filed a Motion To Reopen and Reconsider the Board of Immigration Appeals' decision, which Motion is presently pending before the Board of Immigration Appeals.

A Petition for Review was filed in the United States Court of Appeals for the Seventh Circuit under the provisions of Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105(a)).

REASONS FOR GRANTING THE WRIT

This Court should exercise its jurisdiction in this case for the following reasons.

1. The decision of the United States Court of Appeals for the Seventh Circuit citing *Woodby* v. *INS*, 385 U.S. 276 (1966) lessened the burden of proof that the Supreme Court had enumerated in said case by lowering the burden of proof from "clear, convincing and unequivocal evidence" to reasonable, substantial and probative evidence. Had a higher standard of proof been adherred to by the Court of Appeals the record would not sustain an Order of Deportation.

2. The Petitioner herein has filed with the Board of Immigration appeals a Motion to Reopen his deportation proceeding which was filed with the Board of Appeals in May, 1976 and is presently pending unadjudicated based on the fact that in *Francis* v. *INS*, 532 F.2d 268 (2 Cir. 1976), the Petitioner herein is eligible for the benefits of Section 212(c) of the Immigration and Nationality Act (8 U.S.C. 1182(c)).

3. Jimmy Carter, the President of the United States is presently contemplating, as published in the media, an amnesty for aliens who have been in the United States such as the Respondent and to remove the Respondent from the United States at this point in time would be cruel and unusual punishment.

CONCLUSION

Wherefore, for the above and foregoing reasons, we respectfully submit that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the decision of that Court rejecting this Petitioner's application for adjustment of status.

Respectfully submitted,

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332-0005
Attorney for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Unpublished Order Not To Be Cited Per Circuit Rule 35
(Submitted April 1, 1977)

April 7, 1977

Before

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. PHILIP W. TONE, Circuit Judge

No. 76-1691

FELIPE GAMA-GARCIA,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the Immigration and Naturalization Service.

This matter comes before the court on the filing of briefs by the parties and on the motion of the appellee for affirmance without oral argument pursuant to Circuit Rule 15. On consideration whereof, We GRANT the motion and AFFIRM the order of the district court.

Gama-Garcia, a native and citizen of Mexico, was admitted to this country in 1970 as a permanent resident

on the basis of his marriage to a United States citizen. On April 19, 1973, petitioner was served with an Order to Show Cause charging him with being deportable because the marriage he had entered into was a "sham." At the conclusion of a lengthy deportation hearing, the immigration judge rendered a twenty page decision, which found petitioner deportable under 8 U.S.C. § 1251 (a)(1). In effect, since petitioner's marriage was fraudulent, he was found to have entered this country illegally without the benefit of a valid visa and labor certification. Petitioner was granted a voluntary departure in lieu of a deportation order. Petitioner is seeking judicial review pursuant to 8 U.S.C. § 1105(a) of the March 17, 1976, order of the Board of Immigration Appeals, sustaining the immigration judge's order.

The inquiry of this Court in this appeal is limited to whether or not the findings of the immigration judge are supported by reasonable, substantial, and probative evidence on the record considered as a whole. Woodby v. Immigration & Naturalization Service, 385 U.S. 276 (1966). We can not ignore or substitute our own factual determinations for the reasonable findings of the administrative authorities. *Id.* at 284.

At the deportation hearing Lydia Colon, the woman who married the petitioner, testified that she was paid $400 to enter into the marriage and that she never intended to live with him nor did she ever live with him. This evidence was supported by another witness who was a good friend of Ms. Colon and who had also participated in a fraudulent marriage on the same day. Petitioner's counsel attempted to discredit Ms. Colon by pointing out her criminal record, her drug history, and

her claimed loss of memory at an earlier proceeding. Petitioner testified on his own behalf claiming that he had cohabited with Ms. Colon subsequent to their marriage and the reason that they did not move in together permanently was that Ms. Colon was receiving public assistance benefits which she would lose if she were found living with a man. One corroborating witness and two witnesses attesting to his credibility were called.

In his decision the immigration judge stated:

> In the final analysis the issue here is one of credibility. . . . Having had the opportunity of observing the respondent's demeanor and his manner of testifying, I find his testimony to be lacking in credibility and unworthy of belief. On the other hand, Lydia Colon's testimony was direct, forward, and unhesitant. . . . I find her testimony credible. (Admin. Record at 33)

Although noting that Ms. Colon was not a "paragon of virtue," the judge also found that she would have no incentive to testify falsely as she was terminally ill with cancer. The judge's reasonable findings as to credibility are substantiated by the record and cannot be disturbed by this Court. *Lattig* v. *Pilliod,* 289 F.2d 478, 480 (7th Cir. 1961). Moreover, an independent review of the record as a whole indicated that it contains "evidence that has relevant probative force and which a reasonable mind might accept as adequate to support a conclusion" that the marriage was a sham. *Id.* at 479.

Petitioner's suggestion that this Court should set aside the judge's order because federal courts should not dictate rules about the kind of life which marital partners

may choose to lead is not applicable in this factual setting. Cf. Bark v. Immigration and Naturalization, 511 F.2d 1200 (9th Cir. 1975). In the instant case, there is substantial evidence that the marriage was a sham at its inception. Consequently, any subsequent "irregularities" in their "marital" relationship are irrelevant to this decision.

Petitioner's other arguments are also without merit.

It Is Ordered that the appellee's motion to affirm without argument be GRANTED and the order of the Board of Immigration Appeals is AFFIRMED.

SUPREME COURT, U.S.
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No. 76-1664

In the

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UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File A30 246 996 Chicago — March 27, 1975

In the Matter of
FELIPE GAMA-GARCIA,
Respondent

IN DEPORTATION PROCEEDINGS

CHARGES:

I & N Act—Section 241(a)(1) (8 USC 1251(a)(1))—Excludable at time of entry—Section 212 (a)(14) (8 USC 1182(a)(14) — Immigrant—No valid labor certification

I & N Act—Section 241(a)(1) (8 USC 1251(a)(1))—Excludable at time of entry—Section 212 (a)(19) (8 USC 1182(a)(19) — Immigrant—Visa procured by fraud

I & N Act—Section 241(a)(1) (8 USC 1251(a)(1))—Excludable at time of entry—Section 212 (a)(20) (8 USC 1182 (a)(20)) — Immigrant—Not in possession of a valid immigrant visa or other valid entry document (lodged)

APPLICATION: Termination of proceedings or, in the alternative, voluntary departure in lieu of deportation

IN BEHALF OF RESPONDENT:
Melvyn E. Stein, Esq.
One North LaSalle Street
Chicago, Illinois 60602

IN BEHALF OF SERVICE:
Irving Schwartz
Trial Attorney
Chicago, Illinois 60604

DECISION OF THE IMMIGRATION JUDGE

The respondent is a 33-year-old male. The respondent, through counsel, admitted that he is not a citizen or national of the United States, but is a native and citizen of Mexico who entered the United States at Detroit, Michigan, on or about August 19, 1970. The respondent, through counsel, denied allegations 4 thru 8 and the two charges contained in the Order to Show Cause. The aforementioned allegations denied by the respondent state that he was admitted to the United States as an immediate relative immigrant upon presentation of an immigant visa exempting him from the labor certification requirements of Section 212(a)(14) of the Immigration and Nationality Act because of his alleged marriage to Lydia Colon, a United States citizen, on September 11, 1968, at Chicago, Illinois; that his alleged marriage to Lydia

Colon was not a valid marriage since he had no intention of establishing a bona fide marital relationship with her; that his marriage to Lydia Colon was solely for the purpose of obtaining permanent residence in the United States; that he entered the United States for the purpose of working in the United States; and that at the time of his entry he was not in possession of a valid labor certification and was not exempt therefrom.

The Trial Attorney lodged an additional allegation of fact numbered 9, and the no valid visa charge. Respondent, through counsel, denied the lodged factual allegation and the lodged charge. The lodged factual allegation alleges that he was not in possession of a valid unexpired immigrant visa, entry permit, border crossing identification card, or other valid entry document.

Exhibit 3 in the record is an immigrant visa and application therefor, which was admitted into evidence by stipulation between respondent's counsel and the Trial Attorney as relating to the respondent. Attached to the immigrant visa is the application therefor and certain documents submitted in support of said application. The face of the immigrant visa is endorsed to show that the respondent was admitted to the United States for permanent residence at Detroit, Michigan, on August 19, 1970, in class IR-1 (spouse of United States citizen). In the application for said immigrant visa, the respondent stated that he was proceeding to the United States to join his wife, Lidia Esther Gama, at 1100 North LaSalle Street, Chicago, Illinois. The respondent also claimed therein to be exempt from the requirements of Section 212(a)(14) of the Immigration and Nationality Act inasmuch as he was the husband of a United States citizen.

Lydia Colon appeared and testified in behalf of the Government. She identified Exhibit 4 as an affidavit which she executed before an investigator of the Service, and stated that everything contained in said affidavit was true and correct.

The pertinent part of Exhibit 4 executed by Lydia Colon reads as follows:

> ". . . My true and correct name is Lydia Esther Quinonez. I now use the name of Lydia Colon. I was married to Carlos Manuel Colon on December 10, 1966 in Chicago, Illinois. I was born October 11, 1945 in Manti, Puerto Rico. I am a United States citizen. My father's name was Juan Quinonez-Rosario. He is deceased. My mother's name is Arcadia Torres. My mother is currently residing in Puerto Rico. I was married on September 11, 1966, to Felipe Gama. I have never resided with this man as man and wife at 2205 North Cleveland or at any other address and this marriage has never been consummated. The signature on the visa petition in behalf of Felipe Gama is mine. I signed using the name Lydia Colon. For entering in this marriage with Felipe Gama I received $400. The arrangers of the marriage told me that I would not have to live with this man that I married Felipe Gama as man and wife and they told me that they would have divorce for me in about three or four weeks and if I was ever questioned by anybody to tell them that we were not living together at this time. The names of the arrangers are: Vidal, who worked in the office of the man who paid me for entering into this marriage. I was taken there by Marvin who told me about entering into a marriage for money. Marvin also told me that a lot of girls have done this and they have gotten divorces and told me not to worry that nothing would happen. Marvin took me to meet Johnny, owner of an antique store on Broadway and Clark, from there they took me to the office of the lawyer on Broadway.
>
> I am currently residing at 1007 North California. I am willing to testify to the above facts in court. court. I have given this statement freely and voluntarily. No threats or promises have been made to me."

She identified the respondent as the Felipe Gama referred to in Exhibit 4.

Lydia Colon testified concerning the circumstances under which the arrangements were made for her to marry the respondent. She stated that during the early part of September 1968 she was approached by a man whom she knew as "Marvin" who asked her if she was married. She stated that she replied that she was not, and that Marvin informed her he had a man who would like to arrange a marriage for a third person. This conversation took place at a hot dog stand near Dickens and Halsted Streets in Chicago. She stated that Marvin then took her across the street to a man named "Johnny" who was standing near a station wagon which was parked there. Johnny then asked her if she would be willing to go through a marriage ceremony with someone for $400. It was agreed that she would not have to sleep with the man or live with him, and that a divorce would be arranged within three or four weeks after the marriage. Johnny then took her name and told her he would pick her up in a few days. Several days later Johnny picked her up at her home and they proceeded to the City Hall where the marriage took place. She stated that the other

couple was also married at the same time, and that immediately after their marriage they all took pictures so that it would look "more legal." She further testified that immediately after the marriage ceremony they went to an office somewhere on the north side of Chicago where a man had her sign a paper, which she identified as the visa petition attached to Exhibit 3. She gave this man her birth certificate which he kept. She stated that this man then gave an envelope to Johnny, which Johnny in turn gave to her. She said the man told her not to open this envelope. The man told her that it contained $400, and Johnny would take her home. She stated that the respondent was present and heard this conversation. She further testified that immediately thereafter Johnny, the respondent and herself, and the other couple went out to a restaurant to eat. She stated that after the meal was finished Johnny took her and the other girl in his automobile and dropped them off in the vicinity of Halsted and Dickens Streets in Chicago. She reiterated that the understanding which she had with Johnny from the outset was that she would not live with or have sexual relations with the respondent, and that they would arrange for a divorce in about three or four weeks. Finally, she stated that she did not see the respondent from the day of the marriage ceremony until she saw him in court during the divorce proceedings.

The witness further testified that for approximately a year and a half prior to her marriage to the respondent she had been living in a common-law relationship with one Moses Rivera. She stated that as a result of that relationship she gave birth to a child on June 16, 1972. She further testified that when she was approximately five or six months pregnant Moses was convicted of a

criminal offense and spent six months in jail. Following his release from jail the presiding judge indicated that he would not give Moses any further consideration unless he regularized his marital status with the witness. She thereupon instituted divorce proceedings against the respondent and a divorce was granted January 30, 1973 (see Exhibits 5, 6 and 7). Lastly, she testified that she is still residing as man and wife with Moses Rivera.

Alicia Massa-Medina appeared and testified for the Service. The witness stated that she was born in Caguas, Puerto Rico. She identified the respondent as being the person who married Lydia Colon the same day that she (the witness) married another man. She identified Exhibit 9C and D as pictures of Lydia Colon and the respondent as well as herself and the man she married. She identified the man in the middle of each of these exhibits as being Marvin, who arranged their marriages. The witness stated that she was present with Lydia Colon at the time that Marvin offered her and Lydia money for the purpose of marrying the respondent and the other man shown in Exhibit 9C and D. She stated that it was understood that it would not be a "real marriage," but that they would be divorced thereafter. The witness further testified that Lydia Colon and she grew up together, and that she frequently stayed overnight at Lydia Colon's apartment. The witness stated that following their marriages they and the men whom they married, together with Marvin went to an office on the north side where another man gave both she and Lydia the money agreed upon. Afterwards, they and the men whom they married and Marvin proceeded to the neighborhood where Lydia lived where they were let out of the car. The witness stated that she never saw the man whom she married thereafter. The witness also testified that during

the times that she remained overnight in Lydia's apartment following their marriages to the men described above she never saw the respondent there nor did she ever see any men's clothing in the apartment. On cross-examination, the afore-mentioned witness testified that she has known Lydia Colon since Lydia was about nine years old. She stated that she did not recall the name of the man whom she married at City Hall at which time Lydia had also married the respondent. She further testified that she has never obtained a divorce from that man. She admitted that she was married to Miguel Medina at the time she went through the afore-mentioned marriage ceremony, but states she had not resided with Mr. Medina since about 1963. The witness reiterated her testimony that a man whom she knew as "Marvin" approached her and Lydia near a hot dog stand in the vicinity of Halsted and Armitage Streets in Chicago and suggested to them that they could obtain money for marrying two men in order to help these men obtain immigration papers. She stated that they were informed that they would not have to live with the men and they would arrange divorces for Lydia and her after their immigration problem was settled. She again reiterated the fact that after the marriage they proceeded to an office on the North side where another man gave her and Lydia money which they later counted. She stated that the respondent, Lydia, she and the man whom she married were all present at the time they received the money. The witness stated that she recalled that Lydia had an accident sometime in 1969 for which she was hospitalized. She stated that as a result of this accident Lydia Colon had a scar on her face and was quite ill. She stated that she did not remember Lydia having trouble remembering things after the accident. She further stated that she did not notice anything different about the way Lydia talked following this accident.

The respondent testified in his own behalf. He denied Lydia's version of the purpose for which they were married. He stated that his testimony as set forth in the divorce proceedings (Ex. 5) is true and correct. The essential points of the respondent's testimony contained in Exhibit 5 are as follows: The respondent and Lydia Colon were married September 11, 1968. Following their marriage, the respondent asked Lydia Colon to commence living with him, but she stated that she had two children by a previous marriage and she would have to talk to the children so they would get to know the respondent, and that she wanted her marriage to be a secret. She also told the respondent that his apartment was not large enough for her and the two children. He further testified that between September 11, 1968, and on or about May of 1972, he and Lydia cohabited as husband and wife on numerous occasions both in his apartment and her apartment. During that period of time he asked her on numerous occasions to set up a marital home with him, but she refused to do so. He further testified therein that on or about May of 1972 Lydia informed him that she was pregnant and wished to have a divorce. She told him that he was not the father of the child. She stated that she was going out with another man, who was the father of the child, and whom she wished to marry. Lastly, he testified therein that he had not seen Lydia from May of 1972 up until the divorce proceedings. The record also reflects that Lydia was present in the courtroom at the time of the respondent's testimony.

The respondent also identified photographs (Ex. 9A, B, C, and D) as those taken of Lydia and himself on the

date of their wedding. He also identified the other couple in the pictures as friends of Lydia's who also were married at the same time as Lydia and himself. He identified the man in the center of Exhibits 9C and D as Marvin, whom he described as a friend of Lydia's. He denied that Marvin or the other couple in the pictures are friends of his. The respondent testified that during the course of his cohabitation with Lydia she would absent herself from their home for several days at a time. He stated that she explained that this was necessary in order that she keep receiving financial help from her relatives. He stated that they did cohabit together at the time she signed the visa petition for him, and that they were also cohabiting at the time he proceeded to Canada to obtain his immigrant visa. He denied paying her any money for the purpose of marrying him. He stated that she informed him that she did receive about $400 in cash which she obtained as wedding gifts from her friends, and that she informed him she would buy some clothing and other appliances for herself. He denied ever seeing any part of this money. He denied that he married her for the purpose of obtaining an immigrant visa so that he could remain in the United States permanently. Finally, he testified that he married her with the intent of residing with her as man and wife, that their marriage was consummated and that he had no intention of divorcing her at the time they were married.

Juan Caloretti appeared and testified in behalf of the respondent. He stated that he is an interior designer and has also owned a boutique the last several years. The witness stated that he was a friend of the respondent and had introduced the respondent to Lydia Colon. He stated that this introduction took place about 1966 at a hot dog stand near Halsted and Beacon Streets where he knew

some of the people who used to gather there. He further testified that prior to the marriage Lydia advised him that she was going to marry Felipe and he did not approve of it. He stated that she was a known prostitute and he objected to the marriage. He further testified that he was present at the marriage of Lydia and the respondent as well as the other two people. He testified that following the marriage they proceeded to an office located somewhere in Logan Square in Chicago. He stated that there was a man there whom they thought was a lawyer, who had the respondent go out to have some fingerprints of himself taken. The witness stated that he accompanied the respondent for this purpose and that they were absent from the office for about a half hour to forty minutes. He testified that at no time when he was present did any money change hands in the office nor did he hear of any promise made for money to change hands. He described the other person who was married as Hernando, and stated he believed that he was in Miami at the present time. The witness stated that at the time of the respondent's marriage to Lydia the respondent was residing with the witness. The witness stated that he had gone to Puerto Rico for a vacation for about two weeks and upon returnining home he noticed some women's clothes that belonged to Lydia. He stated that he told the respondent and Lydia to leave, whereupon the respondent became upset and they had an argument. He stated that the reason he asked them to leave was because Lydia had admitted to him previously that she had dealt in narcotics, and that he did not want to become involved in such activity in any way. He also stated that Lydia had admitted to him that she was a drug addict.

On cross-examination the witness admitted that he had not revealed to the Trial Attorney, who had previously

interviewed him, that Lydia Colon was a drug addict or dealer in drugs. He also admitted he never informed the Trial Attorney that Lydia Colon was a prostitute. He admitted that he only answered specific questions that were asked him and did not volunteer any information about her. Finally, the witness admitted that they drove over to the above-mentioned office in Logan Square at the suggestion of the respondent who knew the man that was in the office when they arrived there. The witness stated he did not know anything about the man in question.

Howard Goodman appeared and testified in behalf of the respondent. He stated that he was the owner and operator of a currency exchange in Chicago, and that the respondent has been employed by him as a cashier for the last several years. The witness stated that the respondent is responsible for handling large sums of money; that he has a reputation for truth and veracity; and that he believes the respondent to be a person of good moral character. Finally, the witness stated that he would like to see the respondent remain in the United States.

Edward Superson appeared and testified in behalf of the respondent. He stated that he is employed by the United States Postal Service, and that he has known the respondent for approximately three years. He stated that he sees the respondent on the average of twice a week, and that the respondent has a reputation for telling the truth. He further stated that he believes the respondent is a person of good moral character, and that he would like to see the respondent remain in the United States.

Lydia Colon reappeared and testified during the course of these proceedings on June 13, 1974. Prier to this hearing the respondent's attorneys withdrew from this

case. Although I advised Attorney Engel that I would not permit her to withdraw she nevertheless took it upon herself not to appear. The respondent was given an opportunity to cross-examine the witness, Lydia Colon, but did not do so. At this hearing Lydia Colon denied that she had ever been convicted of prostitution. She admitted that she had used narcotics in the past, but stated she stopped taking them about five years previously. She reiterated the fact that she was given $400 following her marriage to the respondent after she signed some papers and turned over her birth certificate to the man in the office where they had proceeded immediately following their marriage. At this hearing the respondent under questioning by myself denied that he ever agreed, or, in fact, paid money to the witness for the purpose of marrying her. He stated that he married her because he loved her.

The final hearing in this case was held on January 24, 1975, at which time the respondent was represented by present counsel. At this hearing the respondent testified that he married his second wife, Lucille Lidia Maugard, on March 9, 1973, and identified Exhibit 24 as the marriage certificate relating to that marriage. He further testified that he divorced her on May 17, 1974, and identified Exhibit 25 as the divorce decree relating to that divorce. He testified that, to the best of his knowledge, Lucille Lidia Maugard was naturalized as a United States citizen on or about April 26, 1966, in Chicago, Illinois, under the name of Lucille Foster. The respondent admitted that he separated from Lucille Maugard sometime in December 1973. The respondent reiterated the fact that he did cohabit with Lydia Colon subsequent to their marriage, and stated that one of the reasons she did not want him to move into her apartment was

the fact that she would lose her Aid to Dependent Children allowance if a man was found living there. He also stated that she frequently came over to his apartment where they cohabited. Respondent's present counsel stated that he did not perceive any need to further cross-examine Lydia Colon if she were available.

As is customary in cases involving marriage fraud, there is conflicting testimony regarding the circumstances surrounding the alleged marriage of the respondent. The respondent's testimony is to the effect that he married Lydia Colon in good faith and not for the purpose of obtaining an immigrant visa. He claims that their marriage was consummated on numerous occasions, both at her apartment and at his apartment. He further claims that Lydia told him that they could not live together at the beginning of their marriage because she wanted her children to become accustomed to him. Finally, he now concludes that the reason she lied to him was because she was afraid that she would lose welfare payments which she was receiving if a man resided with her in the house, and further, that she was a narcotic addict, which he was not aware of at the time. On the other hand, the affidavit executed by Lydia Colon (Ex. 4) and her testimony during the course of this hearing is to the effect that her marriage with the respondent was arranged solely for the purpose of enabling him to obtain an immigrant visa. Her testimony further reflects that it was agreed that she would be paid the sum of $400 for which she would go through a marriage ceremony with him, file the necessary papers with the Immigration Service, and that shortly thereafter she would obtain a divorce. While it is true that there is some discrepancy in her testimony regarding the chronological sequence of events and details surrounding the circumstances under which she met the

respondent and what took place on the date of their marriage, I do not find this unusual inasmuch as her affidavit and testimony were given four and five years, respectively, after the marriage ceremony took place. In addition, the essential details of her testimony are corroborated by the witness, Alicia Massa-Medina.

The respondent attempted to attack the credibility of Lydia Colon's testimony through the introduction of numerous exhibits. Exhibits 5, 6, and 7 in the record are the transcript of court proceedings, counter-complaint for divorce, and divorce decree relating to the respondent and Lydia Colon's divorce. These exhibits reflect that the respondent was accorded a divorce from Lydia Colon on the ground of extreme and repeated cruelty. Respondent argues that since Lydia Colon was present in court at the time the respondent testified, his testimony during the course of the divorce proceedings and the allegations in this counter-complaint for divorce should be taken as true. However, I note that the divorce proceedings were initiated by Lydia Colon rather than the respondent. In addition, the failure of Lydia Colon to testify and contravene the testimony of the respondent would be totally inconsistent with her desire to obtain a divorce as she claims was the original agreement between the parties. Exhibits 8A, 8B, 11, 12, and 13 relate to criminal proceedings against one Moses J. Rivera in the United States District Court for the Northern District of Illinois. This is the man with whom Lydia Colon admitted she was living with a common law relationship prior to her marriage to the respondent. The respondent claims that the transcript will show that the presiding judge was pressuring Moses Rivera and Lydia Colon to be married in order that he might grant Moses Rivera probation.

Respondent claims that this was the motivation behind Lydia Colon seeking a divorce from the respondent. While it may be inferred that this was the incentive for Lydia Colon for seeking a divorce at that point in time, it does not in any way refute Lydia Colon's testimony as to the circumstances and her reasons for marrying the respondent. Exhibit 19 in the record was introduced by the respondent to substantiate his claim that Lydia Colon had suffered brain damage when she leaped from a burning building in which she was living on November 23, 1969, which impaired her memory. This exhibit consists of excerpts from hospital records relating to seven different admissions of Lydia Colon. A review of these records reflect that she did not suffer any brain damage nor is there any indication in these records that she suffered lapses of memory or that her memory was otherwise impaired. In passing, I note that her last admission to the hospital on February 17, 1974, contains the diagnosis that she is afflicted with carcinoma in situ of the cervix. Lydia Colon is aware of this condition as indicated by her testimony at the hearing on June 13, 1974 (Tr., pg. 226, L. 18). Exhibit 20 in the record are copies of Lydia Colon's arrest record obtained from the Chicago Police Department. These records indicate that Lydia Colon was arrested on March 28, 1968, and on June 6, 1969, and charged with violation of various narcotic statutes. These records reflect that on both occasions the charges were dismissed. The third arrest is one on September 16, 1969, at which time Lydia Colon under the alias of Rosario L. Pagan was charged with shoplifting. No disposition is shown. During the course of the hearing Lydia Colon admitted that she had been a narcotic user in the past, but claims that she has not used any for about the last five years.

In the final analysis the issue here is one of credibility. I must decide whether or not I believe the respondent's version of the circumstances and reasons for his marriage to Lydia Colon or whether I believe Lydia Colon's testimony. The respondent in testifying before me was frequently hesitant and reluctant in answering questions put to him by the Trial Attorney. Having had the opportunity of observing the respondent's demeanor and his manner of testifying, I find his testimony to be lacking in credibility and unworthy of belief. On the other hand, Lydia Colon's testimony was direct, forward, and unhesitant. She testified unequivocally that the arrangement with the respondent was that she marry him for the sum of $400 after which she would not cohabit with him, and that after filing certain papers with Immigration authorities for him she would obtain a divorce. I find her testimony credible and worthy of belief. In passing, I might add that I have taken cognizance of her arrest record and other conduct. However, in cases of this type a person who would enter into such an arrangement could not be expected to be a paragon of virtue. Lastly, Lydia Colon, who is aware that she is afflicted with cancer, would have no incentive to testify falsely at this late date. For the foregoing reasons, I find the respondent's alleged marriage to Lydia Colon was solely for the purpose of obtaining permanent residence in the United States and was not a bona fide marriage. Accordingly, I find that deportability on the charges contained in the Order to Show Cause, as well as the lodged charge, has been established by clear, convincing, and unequivocal evidence.

The respondent applied for the privilege of voluntary departure in lieu of deportation. In support of his application for that relief he testified that he is not married at

the present time; that he has an aunt and uncle and several cousins residing in the United States; that he has never been arrested; that he has never been a member of the Communist Party of any country; that he has sufficient funds with which to effect his departure if required; and that he would depart when and as required. He is presently employed at the H&R Currency Exchange in Chicago, Illinois, where he earns a salary of approximately $80 per week. Based on the foregoing, I find that the respondent has established statutory eligibility for the privilege of voluntary departure, and he will be granted that privilege as a matter of administrative discretion. The respondent designated Mexico as the country to which his deportation should be directed if required by law.

Order: It Is Ordered that in lieu of an order of deportation respondent be granted voluntary departure without expense to the Government on or before May 28, 1975, or any extension beyond such date as may be granted by the District Director, and under such conditions as the District Director shall direct.

It Is Further Ordered that if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall therefore become immediately effective: respondent shall be deported from the United States to Mexico on the charges contained in the Order to Show Cause and on the lodged charge.

/s/ Anthony D. Petrone
Anthony D. Petrone
Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals
Washington, D.C. 20530

Mar 17 1976

Melvyn E. Stein, Esquire
One North LaSalle Street
Chicago, Illinois 60602

GAMA
A20 246 996

Reference is made to your interest in the above case.

For your information, there is enclosed herewith copy of the decision and order of the Board of Immigration Appeals.

Sincerely yours,

/s/ David L. Milhollan
David L. Milhollan
Chairman

Enclosure

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals
Washington, D. C. 20530

Mar 17 1976

File: A30 246 996 - Chicago
In re: Felipe *Gama*-Garcia
In Deportation Proceedings
Appeal

On Behalf of Respondent:
Melvyn E. Stein, Esquire
One North LaSalle Street
Chicago, Illinois 60602

On Behalf of I&N Service:
Paul C. Vincent
Appellate Trial Attorney

Oral Argument: September 11, 1975

Charges:

Order: Sec. 241(a)(1), I&N Act (8 U.S.C. 1251 (a)(1))—Excludable at time of entry —Section 212(a)(14) (8 U.S.C. 1182(a) (14))—Immigrant—no valid labor certification

Sec. 241(a)(1), I&N Act (8 U.S.C. 1251(a) (1))—Excludable at time of entry— Section 212(a)(19) (8 U.S.C. 1182(a) (19))—Immigrant—visa procured by fraud

Lodged: Sec. 241(a)(1), I&N Act (8 U.S.C. 1251(a) (1))—Excludable at time of entry— Section 212(a)(20) (8 U.S.C. 1182(a) (20))—Immigrant—not in possession of a valid immigrant visa or other valid entry document

Application: Termination of proceedings; or, in the alternative, voluntary departure

This is an appeal from the March 27, 1975 decision of an immigration judge finding the respondent deportable on all of the captioned charges and granting him 62 days voluntary departure, with an alternate order of deportation to Mexico. The appeal will be dismissed.

In his detailed and carefully considered decision, the immigration judge has summarized all of the testimony

and other evidence. We, therefore, shall not restate the facts here. The immigration judge concluded that the respondent's admission into the United States was based upon a fraudulent marriage for which he had paid a substantial sum of money. The immigration judge was well aware of the contradictions between the testimony of the respondent and his witnesses, and the testimony of the Immigration and Naturalization Service witnesses, as well as of the discrepancies in the testimony of the chief Service witness, the respondent's first wife. The immigration judge conscientiously observed the demeanor of the witnesses, weighed all of the evidence, and assessed the credibility of the witnesses. He did not believe the respondent's version of the circumstances surrounding the marriage on the basis of which the respondent procured his immigrant visa. Despite discrepancies in detail, the immigration judge did believe the testimony of the respondent's first wife, who testified that she had been paid $400 to marry the respondent and thus assist him to enter the United States as an immigrant. He concluded that the Service had proved deportability on all charges by clear, unequivocal, and convincing evidence. Having read the voluminous record in the case, we have come to the same conclusion.

Counsel for the respondent requests a *nunc pro tunc* order of termination pursuant to Section 241(f) of the Immigration and Nationality Act. An alien seeking termination of proceedings under Section 241(f) bears the burden of proving its applicability to his case. *Matter of Fereira,* Interim Decision 2251 (BIA 1973). The respondent here has not sustained that burden.

At present, the respondent lacks the required family ties, without which Section 241(f) relief is unavailable.

Whether such relief can be granted *nunc pro tunc* is a question we need not reach, since the respondent would be ineligible for it in any case for the following reason: we have recently held that, on the basis of the decision of the Supreme Court of the United States in *Reid* v. *INS,* 420 U.S. 619 (1975), relief under Section 241(f) is precluded in cases where deportability is based on failure to satisfy the labor certification requirement of section 212(a)(14) or Section 212(a)(20), as it is in this case. ***Matter of Montemayor,*** Interim Decision 2399 (BIA 1975).

Consequently, the following order will be entered.

Order: The appeal is dismissed.

Further Order: Pursuant to the immigration Judge's order, the respondent is permitted to depart from the United States voluntarily within 62 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Chairman

Supreme Court, U. S.
FILED
JUL 22 1977
MICHAEL RODAK, JR., CLERK

No. 76-1664

In the Supreme Court of the United States

OCTOBER TERM, 1977

FELIPE GAMA-GARCIA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.,
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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1977. The petition for a writ of certiorari was filed on May 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the finding of the Immigration Judge that petitioner is deportable because he obtained a visa by entering into a sham marriage with a United States citizen is supported by clear and convincing evidence.

STATEMENT

1. On April 19, 1973, the Immigration and Naturalization Service issued an order to show cause why petitioner, a native and citizen of Mexico, should not be deported under Section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1), because he had been excludable at the time of his entry in August 1970, both for having procured his visa by fraud within the meaning of Section 212(a)(19) of the Act, 8 U.S.C. 1182(a)(19), and for not being in possession of a labor certification as required by Section 212(a)(14) of the Act, 8 U.S.C. 1182(a)(14).[1] Specifically, the government charged that petitioner had entered into a sham marriage with a United States citizen, Lydia Colon, for the sole purpose of obtaining permanent residence in the United States.

At the deportation hearing, Colon testified in substance that in 1968 she had agreed "to go through a marriage ceremony with [petitioner] for $400" provided that "she would not have to sleep with the man or live with him, and that a divorce would be arranged within three or four weeks after the marriage" (Pet. App. 5). Following the marriage several days later, she went to an office and signed a visa petition, then received the $400 (Pet. App. 6). She did not see petitioner again until divorce proceedings in court in January 1973 (*ibid.*).

Alicia Massa-Medina, who had been present when the offer of marriage was made to Colon, confirmed the understanding of the parties that the marriage would not be

[1]At the deportation hearing the government also charged that petitioner was deportable under Section 241(a)(1) for failure to have a valid immigrant visa at the time of entry as required by Section 212(a)(20) of the Act, 8 U.S.C. 1182(a)(20).

"real" and that a divorce would be arranged thereafter (Pet. App. 7). Although a close friend of Colon, Massa-Medina never saw petitioner in Colon's presence after their "marriage"; nor did she see any evidence of a man living with Colon (Pet. App. 7-8).

Petitioner's testimony was that his marriage to Colon was bona fide and that they had cohabited together after their marriage but had not lived together permanently because Colon was receiving public assistance benefits that she would lose if she were found living together with a man. Petitioner denied being party to the payment of money to Colon for the purpose of marrying him (Pet. App. 9-10, 13-14).

2. After careful consideration of the evidence (see Pet. App. 1-18), the Immigration Judge found that petitioner's marriage was a fraud that he had entered into solely to obtain permanent residence in the United States. As the Judge noted (Pet. App. 17), "the issue here is one of credibility. I must decide whether or not I believe [petitioner's] version of the circumstances and reasons for his marriage to Lydia Colon or whether I believe Lydia Colon's testimony." The judge then said (*ibid.*):

> [Petitioner] in testifying before me was frequently hesitant and reluctant in answering questions put to him by the Trial Attorney. Having had the opportunity of observing [petitioner's] demeanor and his manner of testifying, I find his testimony to be lacking in credibility and unworthy of belief. On the other hand, Lydia Colon's testimony was direct, forward, and unhesitant. She testified unequivocally that the arrangement with [petitioner] was that she marry him for the sum of $400

> after which she would not cohabit with him * * *. I find her testimony credible and worthy of belief.

The judge noted further that "Lydia Colon, who is aware that she is afflicted with cancer, would have no incentive to testify falsely at this late date" (*ibid.*). He therefore concluded that petitioner's deportability on all charges had been proved by "clear, convincing, and unequivocal evidence" (*ibid.*).

On March 17, 1976, the Board of Immigration Appeals dismissed petitioner's appeal of the order of deportation (Pet. App. 19-22). The court of appeals affirmed, holding that "there is substantial evidence that [petitioner's] marriage was a sham at its inception" (Pet. App. 1a-4a).

ARGUMENT

Petitioner contends, citing *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276, that the court of appeals erred in affirming the finding of deportability on the ground that the government had proven its case by "reasonable, substantial and probative evidence" (Pet. App. 2a), instead of determining whether the finding was supported by "clear, unequivocal, and convincing evidence" (Pet. 5). This contention confuses the standard of proof in deportation cases with the standard of appellate review.

In *Woodby*, this Court held that an Immigration Judge could not enter a deportation order unless the government proved the facts supporting deportation by "clear, unequivocal, and convincing evidence" (385 U.S. at 286). This Court also recognized, however, that the court of appeals, in determining whether the government had met this burden, was not to make its own independent finding but was to determine whether or not the finding of the

Immigration Judge was supported by "reasonable, substantial, and probative evidence on the record considered as a whole" (*id.* at 281-284). To illustrate the difference in the two standards, the Court pointed to the difference between burden of proof and scope of review in criminal cases, where the government must prove guilt to the fact-finder beyond a reasonable doubt but the reviewing court asks only whether the judgment below "is supported by substantial evidence" (*id.* at 282). See Section 106(a)(4) of the Act, 8 U.S.C. 1105a(a)(4); *Kokkinis* v. *District Director of Immigration and Naturalization Service*, 429 F. 2d 938 (C.A. 2); *Yaldo* v. *Immigration and Naturalization Service*, 424 F. 2d 501 (C.A. 6).

Here, both the Immigration Judge and the Board of Immigration Appeals (Pet. App. 21) found that the government had proved petitioner's deportability on all charges by clear, unequivocal, and convincing evidence. The court of appeals, applying the appropriate standard of review, then concluded that this finding was supported by reasonable, substantial, and probative evidence. That conclusion is correct and no further review is warranted.[2]

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[2]Contrary to petitioner's contention, the pendency of petitioner's motion to reopen the deportation proceeding is no reason to grant the petition. As petitioner notes (Pet. 5), the motion is based upon his contention, not raised in the court of appeals, that he is eligible for discretionary relief from deportation under Section 212 (c) of the Act, 8 U.S.C. 1182(c). That issue is separate and distinct from the question raised here whether petitioner is deportable as charged, and must therefore be presented first to the administrative tribunal. Moreover, if the Board of Immigration Appeals determines that petitioner is not entitled to relief, he will have an adequate opportunity to appeal that finding to the court of appeals, and, if necessary, to seek review in this Court.

Finally, whether, or to what extent, the Executive Branch is considering changes in the immigration policy with regard to "aliens who have been in the United States such as [petitioner]" (Pet. 5) is irrelevant to the lawfulness of petitioner's deportation. It is

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

MICHAEL W. FARRELL,
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JULY 1977.

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well established that deportation is not cruel or unusual punishment. See *Mahler* v. *Eby*, 264 U.S. 32; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730; *LeTourneur* v. *Immigration and Naturalization Service*, 538 F. 2d 1368 (C.A. 9), certiorari denied, January 10, 1977 (No. 76-5356); *Brea-Garcia* v. *Immigration and Naturalization Service*, 531 F. 2d 693 (C.A. 3); *Oliver* v. *United States Department of Justice*, 517 F. 2d 426, 428 (C.A. 2), certiorari denied, 423 U.S. 1056; *Santelises* v. *Immigration and Naturalization Service*, 491 F. 2d 1254, 1255-1256 (C.A. 2), certiorari denied, 417 U.S. 968; *Bufalino* v. *Immigration and Naturalization Service*, 473 F. 2d 728, 739 (C.A. 3) (Adams, J., concurring), certiorari denied, 412 U.S. 928; *Chabolla-Delgado* v. *Immigration and Naturalization Service*, 384 F. 2d 360 (C.A. 9); *DeLucia* v. *Immigration and Naturalization Service*, 370 F. 2d 305 (C.A. 7), certiorari denied, 386 U.S. 912; *Burr* v. *Immigration and Naturalization Service*, 350 F. 2d 87 (C.A. 9), certiorari denied, 383 U.S. 915; *United States ex rel. Circella* v. *Sahli*, 216 F. 2d 33 (C.A. 7), certiorari denied, 348 U.S. 964; cf. *Ingraham* v. *Wright*, No. 75-6527, decided April 19, 1977, slip op. 16.

DOJ-1977-07